

1 The debtor's a defendant over here and does not deserve the  
2 deference that's given to a plaintiff by seeking a stay.

3 THE COURT: All right. I understand your position.

4 MR. SHULMAN: Thank you.

5 MS. GROSSMAN: Good morning, Your Honor. Melanie  
6 Grossman of Willkie, Farr and Gallagher on behalf of Natixis  
7 Financial Products, LLC. I just wanted to note my appearance  
8 for the record, but we joined in the papers filed by the BnP  
9 and I don't have anything to add to counsel's arguments.

10 THE COURT: Okay.

11 MS. GROSSMAN: Thank you.

12 MR. TRUST: Good morning, Your Honor. Brian Trust,  
13 counsel to Canadian Imperial Bank of Commerce. This is with  
14 respect to the transaction; it's a synthetic CD I'll refer to  
15 in the pages as Pixus (ph.). And CIBC or Canadian Imperial  
16 Bank of Commerce holds the class A1 note issued by Pixus which  
17 similar to (indiscernible), the CEO issuer in that transaction.

18           You know, first and foremost, we certainly hope for a  
19       trial date. CIBC generally supports the debtors' request for a  
20       litigation stay, like the rationale for the filing of avoidance  
21       actions and we certainly understand and appreciate the debtors'  
22       desire for the stay as stated on the record today as  
23       (indiscernible) in the moving papers.

24 CIBC obviously has several board constituents

25 including its regulated stake holders and some disclosure

1 requirements. The primary focus of what we'd like to suggest  
2 the Court consider really relate to achieving a modest balance  
3 by focusing on some rational, reasonable but limited end date.

4 Not -- nothing that is either too short, nothing  
5 obviously that would go out too, too far as well, but we would  
6 just suggest that the order be entered and the Court consider  
7 putting some reasonable end date in the order for the purpose  
8 of allowing the parties to take stock of where they are, to  
9 allow the parties as well as the Court and all of the parties  
10 in interest to understand where we are in the stake process.

11 It strikes us that this is a, I'd say, a minor burden  
12 that would be placed upon the debtors to actually have to go  
13 back after some reasonable period of time. And just to be  
14 clear, I'm not talking about three or six months, but some  
15 reasonable period of time given the quantum of the lawsuits  
16 filed to in fact move the Court to raise supplemental extension  
17 and give parties in interest an opportunity at that point in  
18 time to consider what their rights are as opposed to an all-  
19 the-time obligation for, you know, cause shown. Because facts  
20 change, circumstances change and it's impossible to -- they  
21 have these litigations with them play out (sic).

22 So from CIBC's perspective, we are only focused on the  
23 tenor and we think that the minor adjustment of the reasonable  
24 time with the debtors would be in everyone's interest and  
25 certainly preserve the interest of the estate, as well.



1 Thank you, Your Honor.

2 THE COURT: Okay. Thank you, Mr. Trust.

3 (Indiscernible) --

4 MR. WILSON: Your Honor, this is Bruce Wilson of Kutak  
5 Rock appearing telephonically on behalf of Nebraska Investment  
6 Finance Authority.

7 THE COURT: Okay.

8 MR. WILSON: We're the last objector, I think, to the  
9 motion. And we believe we're material and different than the  
10 other objectors in one respect and that is in our circumstance,  
11 the debtors have committed -- it has been alleged that an  
12 individual or former employee of the debtors have (sic)  
13 committed actual fraud. And in that context we believe that  
14 internal discovery and mediation would be insufficient because  
15 we may need sworn statements -- just doing depositions, we may  
16 need (indiscernible). There's currently no talking  
17 preservation requirement in place.

18 So, for the reason that we believe there's been an  
19 alleged actual fraud, nothing in these circumstances would  
20 compel our case with an -- except if we were -- except if we  
21 were staying to proceed.

22 Now, we also believe we're getting prejudice because  
23 we filed the claim that the debtor owed the Nebraska Investment  
24 Finance Authority a certain sum and they allege that we owe the  
25 debtors a certain sum plus interest. And we believe interest

1 is accruing and we don't believe the debtors should both file a  
2 claim against our claim and as for a stay, all interest is  
3 accruing.

4 THE COURT: That's your position?

5 MR. WILSON: yes, Your Honor. We believe that because  
6 the -- primarily, the allegation is actual fraud. But we don't  
7 believe that the parties should sit back and really do nothing  
8 and, you know, in terms of (indiscernible) mediation, really  
9 amounts to, in our view, an insufficient measures (sic) to  
10 protect and preserve evidence and to move forward.

11 THE COURT: Okay. I've heard you.

12 Are there any other objectors on the (indiscernible)?

13 MR. MILLER: I counted eight, Your Honor, and they  
14 were all identified.

15 THE COURT: All right. Have you been counting? I  
16 haven't. Mr. Miller, do you want to respond?

17 MR. MILLER: Very briefly, Your Honor. First, I'm a  
18 little confused, Your Honor, by Nebraska, because in their  
19 papers, they basically say mediation should be ordered to  
20 proceed immediately. And if not successful, the stay should be  
21 lifted. I think the position announced by the gentleman on the  
22 phone is different from that.

23 But more importantly, Your Honor asked a key question.  
24 How are any of the defendants prejudiced, particularly in light  
25 of the fact, as Your Honor pointed out, adversary proceedings



1 by their nature take a long time -- nobody's fault in  
2 connection with that. And we're talking about, Your Honor, 445  
3 names defendants in the 58 actions. And when we are able to  
4 identify the note holders in some of these transactions, that  
5 number may multiply by two times. So we may be talking about  
6 1,000 defendants.

7 And the objective of the stay motion, Your Honor, is  
8 to avoid proceedings in this courtroom. As Your Honor pointed  
9 out, there's no intention to sit around and just let time  
10 expire. The effort is going to be to try and find an expedient  
11 means, maybe alternative dispute resolution, to resolve these  
12 claims.

13 In addition, there is further diligence that has to be  
14 done with respect to all of the claims, Your Honor. It would  
15 be, in our view, Your Honor, in the interest of judicial  
16 economy, to avoid having constant proceedings before Your Honor  
17 about discovery, about timings and schedules. The concept of  
18 having scheduling orders for all of these matters, Your Honor,  
19 would tie you up, I think, for weeks. And would be  
20 unnecessary, particularly if we can resolve this in another and  
21 easier fashion.

22 So we have 445 named defendants; we have over 230  
23 towing (ph.) agreements covering hundreds of defendants. So  
24 what we're talking about, Your Honor, essentially is well over  
25 1,000 defendants. In terms of preservation, all the records

1 are being preserved. There is no substantive relief here that  
2 would in any way affect the rights of any of the defendants.

3 The two limited objections, Your Honor, basically  
4 say -- all they ask Your Honor to do is fix a time limitation.  
5 Given the scope and the complexity of all of these  
6 transactions, they're not simple vendor preferences, Your  
7 Honor. They're very complex situations in some of the  
8 situations, and some of them, frankly, are novel and have to be  
9 discussed among the parties.

10 This gives us the opportunity to search out a method  
11 to deal with all of these claims, and in the context that  
12 there's no prejudice to anybody. Insofar as the debtors' right  
13 to go forward, these are the debtors' claims. It's sort of  
14 weird in my experience, Your Honor, for the defendants to  
15 object to lack of prosecution of a plaintiff's action. These  
16 are plaintiff's claims, clearly within the (indiscernible)  
17 discretion of the Court.

18 So we would ask that Your Honor grant this motion.  
19 The objectors are protected; they can come to court if there's  
20 cause to modify the stay, if we're not making progress. And,  
21 Your Honor, I would commit at every state of the estate or  
22 every omnibus hearing, we could give Your Honor a report as to  
23 where we stand in connection with avoidance actions. So in  
24 that context, Your Honor, I don't believe there's any prejudice  
25 and so request that the order be entered, Your Honor.



1 THE COURT: All right. Thank you, Mr. Miller.

2 I receive monthly reports from Mr. Miller's partner,  
3 Peter Vimberger (ph.) concerning the progress of the ADR  
4 program, which is currently underway in these cases. And those  
5 letter reports are uniformly encouraging.

6           One of the modest achievements of this bankruptcy case  
7   has been dedication of resources outside of the Bankruptcy  
8   Court to dispute resolution. And without going into specifics,  
9   I am satisfied that the ADR program is working extremely well.

10 My understanding of the motion for a stay is that ADR  
11 mediation, conversation between the debtors and defendants in  
12 these adversary proceedings will be taking place during the  
13 period of the request in (indiscernible). I've reviewed the  
14 objections to the stay and the response to those objection  
15 filed by the debtors and I am satisfied that a stay is  
16 absolutely desirable here and in the best interests, actually,  
17 of all parties.

18           The only real issue may be complaints of individual  
19 defendants, (indiscernible) being one, that somehow the stay  
20 shouldn't apply to them. I'm not carving anybody out today.  
21 I'm going to enter an order that will apply to all defendants  
22 in all other avoidance action adversary proceedings. But I  
23 note that to the extent that any party, whether it's a party  
24 represented by Boies, Schiller or (Indiscernible) or any other  
25 party for that matter, that is in a position to articulate

1 distinguishing characteristics that would suggest that the  
2 imposition of the stay as to that party or parties is  
3 inappropriate or prejudicial.

4 The order permits the filing of appropriate motion  
5 papers in the hearing to consider, in effect, relief from the  
6 stay. And in fact, something not particularly (indiscernible)  
7 from the firm, motions for stay relief that are heard and  
8 considered by bankruptcy courts every day of the week.

9 I am concerned, however, about the completely open-  
10 ended nature of the stay and I note that my colleague Judge  
11 Drain with Adelphi cases has entered a number of orders as  
12 relating to the impositions of a stay. And I note that many of  
13 the objectors have directly or indirectly raised some questions  
14 as to having a stay that doesn't have an end date.

15 Independent of those objections, I had some concern  
16 about a stay that doesn't have an end date. And so the  
17 question becomes, what should the end date be? Three or four  
18 months is too short, a year is too long. And something in  
19 between there may not be (indiscernible) but it will be part of  
20 the order.

21 I'm going to impose a nine-month period with the  
22 understanding that within the nine-month period, there will be  
23 active discussions between the debtors and the defendants.  
24 There may be possible claims resolutions and presumably, an ADR  
25 program that will take place within the period of time after



1       there has been sufficient active sharing of information that  
2       allows for a meaningful ADR process to proceed.

3               The only thing really that the stay is doing is  
4       looping the unnecessary pursuit of hostilities in this court.  
5       I heard the reference to doing this by means of a scheduling  
6       order and candidly, that's what I do in every one of the  
7       adversary cases on my docket. One of them, and you may know  
8       which case I'm talking about, involved the scheduling order  
9       that calls for a trial date in March of 2012. That's a  
10      scheduling order that demonstrates that litigation takes a long  
11      time and as a result, it's a scheduling order that doesn't  
12      answer the question before the Court.

13             As Mr. Miller both stated and implied, the Court has a  
14      responsibility here to manage the docket. And the docket in  
15      these extraordinarily complex cases, I believe, is unique. It  
16      is unique not only in respect of the subject matter that is  
17      being presented for adjudication on this morning's hearing in  
18      connection with Alegra (ph.) settlement demonstrates the  
19      extraordinary complexity of many of the transactions that are  
20      at issue in the various litigations that are pending on the  
21      adversary docket. But it also demonstrates that parties need  
22      time in order to understand the strengths and weaknesses of  
23      their positions and to accommodate one another in reference to  
24      the actual risks the parties face.

25             I'm entering an order in the form presented with the

1 understanding that it will be a nine-month duration for the  
2 stay. I do have some concern as to the unilateral ability of  
3 the debtors to, in effect, declare that the stay is no longer  
4 in effect.

5 I'm going to leave that provision in with the  
6 understanding that the debtors' ability to do that will be for  
7 good cause. And provided that there is good cause shown, and  
8 I'm confident that the debtors will be in a position to do  
9 that, I see no particular reason for the Court to be a  
10 gatekeeper for a stay that is designed to benefit, in this  
11 instance, the plaintiff.

12 Those are my comments. The motion is granted.

13 MR. MILLER: Thank you, Your Honor.

14 THE COURT: If anyone wishes to be excused now, you  
15 may be excused in reference to --

16 MR. MILLER: Yes, Your Honor --

17 THE COURT: -- (indiscernible) docket.

18 MR. MILLER: -- item 8 is the (Indiscernible)  
19 representing (indiscernible).

20 THE COURT: We have one of the matter relating to  
21 expedited discovery.

22 MR. DEFILIPPO: Yes, Your Honor.

23 Good morning, Your Honor. Paul DeFilippo, proposed  
24 counsel for the debtors, adversary 10-03547. This is a slight  
25 exception to the stay, Your Honor, just to prove in this action



1 there were forty-seven transactions and there's -- the  
2 collateral has been distributed. It involves the ipso factor  
3 doctrine Your Honor ruled on in BNY. We seek limited expedited  
4 discovery to identify the note holders who were the ultimate  
5 recipients of that collateral. That information is not  
6 currently in the debtors' possession. We think that shows  
7 cause for the issuance of an order permitting expedited  
8 discovery.

9 We've received two objections; we believe we've  
10 resolved them with an amended order that was provided to Your  
11 Honor in which the objectors have proved which resolves their  
12 desire to have copies of the discovery served on them as well  
13 as the information received and addresses confidentiality  
14 issues.

15 We have one change to make to the order if Your Honor  
16 is prepared to grant the motion to resolve an issue by the  
17 committee that goes to the committee not being required to pay  
18 for the documents when they are provided to the committee.

19 THE COURT: So it sounds as if it's all consensual at  
20 this point.

21 MR. DEFILIPPO: I believe so, Your Honor, yes.

22 THE COURT: Let's just confirm that that's true. Is  
23 it all consensual at this point?

24 UNIDENTIFIED SPEAKER: Yes, Your Honor, on behalf of  
25 the committee.

1 MR. DOWNEY: Your Honor, Richard Downey for Deutsche  
2 Bank and our concerns were addressed.

3 MR. TOP: Good morning, Your Honor. Frank Top from  
4 Chapman and Cutler on behalf of US Bank National Association  
5 and I can confirm that we're fine with the Court  
6 (indiscernible).

7 THE COURT: Okay, that was easy. I'll enter it on  
8 consent.

9 MR. DEFILIPPO: Thank you, Your Honor.

10 THE COURT: Now we're down to the SIPC --

11 MR. WILTENBURG: Yes, Your Honor.

12 THE COURT: -- agenda. Everyone who was involved in  
13 the first part of this morning's calendar who wishes to be  
14 excused may leave.

15 (Pause)

16 MR. WILTENBURG: Your Honor, David Wiltenburg, Hughes,  
17 Hubbard and Reed on behalf of the SIPC trustee.

18 On today's calendar there are two related items. The  
19 principal item is the motion of Newport Global for permission  
20 to take 2004 discovery. And there's a related motion by  
21 Newport to seal certain aspects of that motion.

22 And as today started, I think all parties were  
23 prepared to go forward with argument on the motion. Indeed,  
24 Mr. Caputo is here from SIPC, prepared to make comments and Mr.  
25 Kobak was prepared to put the motion into a larger context



1 about which you'll hear more next week.

2 However, in discussions this morning, we have -- the  
3 parties have been able to reach an accommodation that results  
4 in adjournment of the motion without date.

5 THE COURT: Okay.

6 MR. WILTENBURG: And I'm prepared to answer any  
7 questions the Court may have on that. But, the result is that  
8 we don't need to address the principal motion. It may be that  
9 as a technical matter the sealing motion is still on the table.

10 The sealing motion related to certain exhibits and  
11 information related to the motion. The trustee -- again, it is  
12 Newport's motion; the trustee has not opposed it.

13 THE COURT: I looked at Newport's motion and I saw  
14 that Exhibit I was under seal. I've never seen Exhibit I. I  
15 also noted that there was a paragraph that had a number of  
16 blackline provisions redacted out; I've never seen the full  
17 motion. It doesn't matter, I assume and because I was able to  
18 get to the essence of the motion, I have no official need to  
19 see it, but I would like to see the document that I haven't  
20 been able to see.

21 MR. WILTENBURG: Your Honor, we'll arrange for a  
22 courtesy --

23 THE COURT: Mr. Molton's here, I think he's getting up  
24 to tell me I can get the document.

25 MR. MOLTON: Good morning, Your Honor. David Molton

1 for the two Newport movants from Brown Rudnick.

2 We apologize that Your Honor did not get the  
3 unredacted copy. We will get those to you today.

4 THE COURT: It's possible that they came to chambers.  
5 I was preparing my (indiscernible) --

6 MR. MOLTON: All right.

7 THE COURT: -- so I was looking at the document and  
8 (indiscernible) system.

9 MR. MOLTON: And I don't think the redactions were of  
10 a great extent in the document, so --

11 THE COURT: No.

12 MR. MOLTON: So, yeah, I just want to confirm with  
13 what Mr. Wiltenburg said we did meet at his offices this  
14 morning and I'm pleased to announce that we resolved the  
15 matter. So the motion would be, you know, adjourned without  
16 date and we'll get documentation to Your Honor. We'd  
17 appreciate it if Your Honor would grant the sealing order for  
18 the limited amount of confidential information that the SIPA  
19 trustee had provided us.

20 THE COURT: Yes, that's granted (indiscernible).

21 MR. MOLTON: Thank you. And that's -- unless Your  
22 Honor has any other questions, I'm done for today.

23 THE COURT: Great. You're excused.

24 MR. MOLTON: Thank you.

25 MR. WILTENBURG: Your Honor, I think that's the end of



1 the calendar for today. So --

2 THE COURT: I do have some questions for you, then.  
3 As I reviewed the 2004 motion presented by Newport and the  
4 trustee's response, I viewed the arguments to be less about  
5 discovery and more about a timely disposition of the claim  
6 determination in respect of any other position (indiscernible)  
7 claimed customer of LBI and the intricacies of the relationship  
8 with LBI and LBIE claim, the allocation of that claim and  
9 matters of (indiscernible). And so what I'm interested in  
10 knowing, although I don't need to hear anything that is not yet  
11 ready for primetime, is whether the parties have had any  
12 meaningful discussions about the timing for disposing of the  
13 principal issues and dispute between parties.

14 MR. WILTENBURG: Your Honor, that has been approached  
15 in a couple of ways. As the Court may recall, there was  
16 initiative last March on behalf of a group of parties including  
17 Newport and others similarly situated claimants whose -- who  
18 have claims through LBIE. And at that time, we opposed the  
19 idea of setting that litigation in motion right then because  
20 the -- at the time, there was an intensive effort between the  
21 LBI estate's professionals and the LBIE estate's professionals  
22 to reconcile and to see whether the two enemies did indeed, as  
23 in theory they -- in the ideal world they would have kind of  
24 mirror image accounts of -- so that the books and records would  
25 match and the extent of the customer claim would be fixed.

1           That effort resulted in allowance by the trustee of  
2     the LBIE omn -- what's called the LBIE omnibus claim. That is  
3     the portion of LBIE's claim that is asserted on behalf of LBIE  
4     customers; that's -- the terminology for that is the omnibus  
5     claim. And it was allowed in mid-September in an amount  
6     exceeding six billion dollars.

7           However, the reconciliation effort is not at an end.  
8     In the great mass of information underlying that six billion-  
9     plus dollars in allowed claim, there are many transactions --  
10    part of the uncertainty results in the mismatch between the  
11    LBIE filing date which is September 15 and the LBI filing date  
12    which is September 19. And it continues to be a project for  
13    the professionals to sort out what happened during that  
14    peculiar period of time.

15           So, that reconciliation is -- has made great progress  
16    but is not at an end. And so in deference to the continuing  
17    discussions, the trustee agreed to extend LBIE's time to object  
18    to that partial allowance by an additional ninety days. And so  
19    a lot has been but the parties, that is LBIE and LBI, are not  
20    at the end of the road in getting to the point of knowing what  
21    they agree on exactly and knowing what they disagree on  
22    exactly.

23           And until that -- those two things are known, we  
24    continue to feel that it would be premature to put litigation  
25    in motion regarding the LBIE claimants. Because if it turns



1 out that there's a match between what LBIE is claiming against  
2 LBI, on the one hand, and what the claimant is claiming against  
3 kind of a Lehman enterprise on the other hand, it will be  
4 unnecessary in those cases to address the question of whether  
5 these claimants are independently customers of LBI, because  
6 they're -- in effect, their derivative customer status will  
7 come to the same thing from the point of view of an LBI-allowed  
8 claim.

9 And so, that has been our thinking in terms of where  
10 this category of disputed claims would be slotted into, you  
11 know, a broader schedule covering many categories of disputed  
12 claims. About which Mr. Kobak will make further remarks at the  
13 hearing next Thursday.

14 THE COURT: What do you estimate is the time you're  
15 (indiscernible) getting to that result?

16 MR. WILTENBURG: Well, the parties picked ninety days  
17 as kind of a benchmark for that from the determination date  
18 which I believe was September 16. If the professionals tell us  
19 they think it's productive to extend beyond that, if -- it  
20 could occur, I guess we would hope that any extension beyond  
21 that would not, you know, take us to the, you know, too far  
22 down the road.

23 THE COURT: Okay. Apparently my question made Mr.  
24 Molton want to get up.

25 MR. MOLTON: I didn't expect to have to get up again,

1 Your Honor, but I do want to say that what -- I know Mr.  
2 Wiltenburg has his position on this. We dispute many parts of  
3 it; that's going to be left for another day in front of Your  
4 Honor. Clearly, I think, on behalf of all the prime brokerage  
5 customers who have no alleged LBI connections, we'd like that  
6 heard sooner than later.

7 We believe that the legal issues, as Your Honor  
8 focused on, are not necessarily dependent on the reconciliation  
9 per se and the exact line items in the various accounts. And I  
10 think Your Honor suggested that you may have recognized that.

11 And another point that I have to dispute because we're  
12 not here to argue it, but it just -- lest silence be construed  
13 as assent, we disagree that if the reconciliation matches, it's  
14 an apples to apples situation. Clearly what happens overseas  
15 in London and how involved my client and the other prime  
16 brokerage get treated under the administrator's proposed scheme  
17 or plan or what have you, may leave us much worse off in terms  
18 of having our property being treated as part of the general  
19 unsecured ball (ph.) and not in a preferred matter, as it is as  
20 a SIPA customer, having to share it not only with other  
21 customers of LBIE but also vendors and other general unsecured  
22 creditors.

23 So, clearly, from our position, we don't agree with  
24 Mr. Wiltenburg that it's an apples to apples and if there's a  
25 pure reconciliation it doesn't make a difference. The



1 customer, I'm sure Your Honor knows since I was here two years  
2 ago in front of Your Honor when this began on this issue and  
3 Your Honor gave me a hard time then on the 2004 motion. I  
4 think the twenty-four months has made a little bit --

5 THE COURT: I was planning on giving you a hard time  
6 again.

7 MR. MOLTON: I'm sure you were, Judge. We actually  
8 got a call from Mr. Wiltenburg yesterday and we were able to  
9 resolve it today. I knew -- I know that you -- but in any  
10 event, you know, we believe that the customer issue for these  
11 prime brokerage customers is extremely important; is one that  
12 can be heard and decided upon relatively promptly. And we  
13 would urge the trustee to tee it up and let it go. Indeed,  
14 when we talked, we had meetings with the ad hoc group last  
15 March, maybe it was January through March. We were actually  
16 encouraged to create proposed stipulated facts and questions of  
17 law that would form the basis of a, you know, of a hearing to  
18 expedite the process.

19 That, unfortunately, went nowhere as I think that the  
20 trustee continued to put its weight on finding a protocol with  
21 LBIE, which at this point, as Your Honor had read the papers,  
22 we don't believe is ever going to occur.

23 So, I just needed to say that in light of what Mr.  
24 Wiltenburg said. So, thank you, Your Honor.

25 THE COURT: Okay. What we've just heard is just

1 colloquy on the part of both the trustee and Newport in  
2 response to a question that I'm sorry I asked.

3 We've got -- is there anything new for today?

4 MR. MOLTON: Your Honor, I think not.

5 THE COURT: Okay. We'll adjourn until the 2 o'clock  
6 adversary block out (ph).

7 (Whereupon these proceedings were concluded at 11:48 a.m.)

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I N D E X

R U L I N G S

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C E R T I F I C A T I O N

I, Lisa Bar-Leib, certify that the foregoing transcript is a true and accurate record of the proceedings.

**Lisa Bar-Leib**

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